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In the Supreme Court of the United States

OCTOBER TERM, 1985

ARCHER-DANIELS-MIDLAND COMPANY AND NABISCO BRANDS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an order denying a motion to disqualify opposing government counsel in a civil case is immediately appealable under 28 U.S.C. 1291, where the asserted ground for disqualification is an alleged violation of Fed. R. Crim. P. 6(e).

2. Whether Fed. R. Crim. P. 6(e) prohibits government attorneys who participated in a grand jury investigation from preparing for and litigating a subsequent, unrelated civil suit involving parties to the grand jury investigation, where the attorneys' participation in the civil suit entails no use or disclosure of grand jury materials.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 785 F.2d 206. The orders of the district court (Pet. App. 15a-19a, 20a-21a, 22a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on February 24, 1986. The petition for a writ of certiorari was filed on May 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Prior to June 1982, petitioners Archer-Daniels-Midland Company (ADM) and Nabisco Brands, Inc. (Nabisco) were, respectively, the nation's second and third largest producers of high fructose corn syrup (HFCS). On June 12, 1982, Nabisco leased both of its HFCS manufacturing facilities to ADM, making ADM the nation's largest HFCS producer. Because the transaction involved a lease, petitioners did not notify the Antitrust Division of the Department of Justice before the transaction occurred. In July 1982, the Antitrust Division began a civil investigation to determine whether the lease agreement amounted to an acquisition in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. In December 1982, the government filed a civil complaint in the United States District Court for the Southern District of Iowa, alleging that the transaction violated both the Sherman and Clayton Acts. Pet. App. 3a, 16a.[1]

b. Six months later, this Court held in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 318 (1983), that attorneys from the Civil Division of the Department of Justice who did not participate in a grand jury investigation were required to obtain a

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[1] The Herfindahl-Hirschman Index (HHI) is generally accepted as the most accurate measure of industry concentration. Markets with an HHI of more than 1800 are considered highly concentrated, and, except in extraordinary cases, the Department of Justice will challenge acquisitions that result in an increase in the HHI of more than 100 points and a post-merger HHI substantially in excess of 1800. U.S. Dep't of Justice, *Merger Guidelines* 15 (1984). In this case, the HHI in the relevant market was at least 1610 prior to ADM's acquisition of the use of Nabisco's facilities and 2140 afterwards.

disclosure order under Fed. R. Crim. P. 6(e)(3) before they could review grand jury materials in connection with a civil proceeding stemming from matters investigated by the grand jury. Although the acquisition challenged in this case had not been the subject of any grand jury proceedings, and although the government attorneys who conducted the civil investigation had not reviewed or relied on any grand jury materials in doing so, petitioners filed a motion to dismiss the complaint based on *Sells*. They argued that *Sells* required dismissal of the complaint because several of the government attorneys involved in this case, as well as an economist and paralegal, had participated in an earlier grand jury investigation into possible price fixing in the corn wet milling industry, whose products include HFCS.[2] That grand jury had terminated without returning an indictment[3] 18 months prior to the acquisition that led to this civil antitrust suit, and all of the materials that the grand jury had reviewed were subject to an impoundment order entered by a district court in another proceeding. Pet. App. 2a & n.2, 16a. Nevertheless, petitioners argued that an attorney's recollection of matters occurring before the grand jury amounts to a "disclosure" of grand jury materials in violation of Rule 6(e) (Pet. App. 17a).

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[2] Petitioners' suggestion (Pet. 8) notwithstanding, neither court below found, and there is no evidence, that any government attorney made any use of grand jury materials except to respond to petitioners' discovery efforts on the Rule 6(e) issue. Pet. App. 13a.

[3] Petitioners err in suggesting (Pet. 6 & n.1) that the grand jury made a "finding relating to alleged price collusion in the [corn wet milling] industry."

The district court denied petitioners' motion (Pet. App. 15a-19a). The court pointed out that *Sells* left open the question whether the " 'continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution' " requires a Rule 6(e) disclosure order (Pet. App. 17a (quoting *Sells*, 463 U.S. at 431 n.15)). However, the court found that the issue in this case differed from the one left undecided in *Sells*, because this case involved an allegedly unlawful merger, rather than price-fixing, and therefore was not "a civil phase of the same matter that was investigated by the grand jury" (Pet. App. 18a; see *id.* at 19a n.2). Moreover, the court held that, even if "*Sells* extends to [such a] situation * * * it stops short of the far more attenuated situation involved in this case" (*id.* at 18a). Finally, the court concluded that, even assuming that it was improper for an attorney to participate in a civil suit that allowed him to draw upon his recollection of the evidence examined by a grand jury investigation, dismissal of the complaint was an inappropriate remedy (*ibid.*).

c. Two weeks later, petitioners moved to disqualify the government attorneys and staff who had participated in the earlier grand jury investigation, and sought an injunction prohibiting the government from disclosing any grand jury materials without a Rule 6(e) order. Ruling from the bench, the district court denied the disqualification motion (Pet. App. 29a). The court reiterated its earlier finding that "this case is not a civil phase of the same matter that was investigated by the grand jury" (*id.* at 22a), noting that "the operative facts giving rise to this lawsuit didn't occur until after the grand jury had finished its work" (*id.* at 22a-23a). Because of

"some missteps" in the government's handling of grand jury materials, however (*id.* at 29a),[4] the court did grant petitioners' request that the government be enjoined from disclosing grand jury materials in violation of Rule 6(e) (Pet. App. 29a). At the same time, the court observed that this portion of the motion "really isn't controverted" (*ibid.*),[5] and that its order amounted to "actually * * * nothing more than the law provides anyway" (*id.* at 30a). Petitioners did not appeal the district court's denial of their disqualification motion.

d. Petitioners then filed a third motion, in which they again sought dismissal of the case and disqualification of government counsel. They renewed their

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[4] The district court noted in its first order that an economist who was involved in this case had received grand jury materials in another case involving a different investigation from one of the attorneys involved in this suit (Pet. App. 16a-17a). The court also pointed out that one of the attorneys participating in this suit had (approximately at the time of ADM's acquisition, and well before this Court's ruling in *Sells*) directed that some grand jury exhibits be delivered to him. That attorney, however, never reviewed the materials. In the same order, the district court also found that there was no evidence suggesting that materials from the price-fixing investigation had ever been disclosed by any persons who were involved in the grand jury proceedings, including the government attorneys in this case (Pet. App. 17a).

[5] At a hearing on the motion, government counsel emphasized that this suit was unrelated to the earlier grand jury proceeding and that the attorneys and staff involved in this case had not used, and had no intention of using, any grand jury materials in any way in the preparation for or the litigation of this suit. Although the government saw no need for the injunction sought by petitioners, it did not strongly object to that aspect of their motion.

contention—already twice rejected by the district court—that the assignment to this case of attorneys and staff who had been involved in the earlier price-fixing grand jury investigation violated Rule 6(e). On November 6, 1984, the district court denied this motion, reiterating its earlier holdings that it did not violate Rule 6(e) for the attorneys who participated in the unrelated grand jury price-fixing investigation to participate in this case (Pet. App. 20a-21a). Although the court stated that the Department had followed "questionable 'storage' practices" regarding grand jury materials (*id.* at 21a), it found no evidence disclosing "any violation of Rule 6(e)(2) that is material to this lawsuit" (*ibid.*).

2. Petitioners appealed the district court's denial of their third motion, and the court of appeals affirmed (Pet. App. 1a-14a). At the outset, the court of appeals held that the district court's November 6 order denying petitioners' disqualification and dismissal motion was immediately appealable under the "collateral order" doctrine (Pet. App. 6a-8a). The court of appeals acknowledged that *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), held that an order denying a motion to disqualify opposing counsel was not a collateral order (Pet. App. 7a-8a), but found that this case was "qualitatively different from *Firestone*" (*id.* at 8a). In the court of appeals' view, the district court "did more than simply deny a motion to disqualify counsel," because the district court's order "concern[ed] the secrecy of grand jury proceedings" (*ibid.*). An immediate appeal was therefore necessary, the court stated, to allow petitioners to avoid "losing 'the legal and practical value' of the rights they have asserted" (*ibid.*).

On the merits, the court of appeals agreed with the district court that neither Rule 6(e) nor *Sells* required the disqualification of the attorneys who were involved in an earlier grand jury investigation from a subsequent civil suit involving parties to that investigation (Pet. App. 8a-13a). The assignment of an attorney who had participated in a grand jury investigation to a subsequent civil suit did not amount to a "disclosure" within the meaning of Rule 6(e), the court held, because an attorney's recollection of facts did not constitute a revelation of information to a third party (Pet. App. 11a). That ruling was buttressed, the court stated, by the fact that the two proceedings were "distinct and separate" (*id.* at 12a). Finally, the court of appeals upheld the district court's' finding that the government had not violated Rule 6(e) in this case (Pet. App. 13a).

ARGUMENT

1. There is a dispositive jurisdictional point. A district court order denying a motion to dismiss a complaint is not appealable before the entry of a final judgment. See *Catlin* v. *United States*, 324 U.S. 229, 236 (1945). And a district court order denying a motion to disqualify an opposing counsel in a civil case is neither a "final decision" under 28 U.S.C. 1291 nor an appealable "collateral order" under the doctrine announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). Accordingly, the district court's order denying petitioners' third and final motion for dismissal of the complaint and disqualification of government counsel cannot be appealed prior to the

entry of a final judgment in this case.[6] The finality requirement of 28 U.S.C. 1291 is jurisdictional, and a court of appeals cannot decide the merits of an appeal over which it lacks jurisdiction. *Flanagan* v. *United States*, 465 U.S. 259, 263, 270 (1984); *Firestone*, 449 U.S. at 379. Therefore, because the court of appeals lacked jurisdiction over petitioners' appeal from the district court's November 6, 1984, order, the questions presented in the petition are not properly before the Court at this time.

The court of appeals distinguished *Firestone* and ruled that the district court's order denying petitioner's third motion was an appealable collateral order (Pet. App. 7a-8a). The court reasoned that the district court's order "concerns the secrecy of grand jury proceedings" and any potential harm to petitioner's "interests which are sought to be protected by keeping grand jury proceedings secret cannot be undone by later reversal of the district court order" (*id.* at 7a). That reason, however, is plainly insufficient to justify the court of appeals' ruling on this issue in this case.

The order denying petitioner's disqualification motion based on an alleged violation of Rule 6(e) is no less interlocutory than the order in *Firestone* where the disqualification motion was based on an alleged violation of the canons of ethics. Neither the strength of a party's claim in a given case,[7] nor the

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[6] Petitioners did not file a notice of appeal from either of the district court's orders denying their two earlier motions, and the time for doing so has now lapsed. In any event, the reasons given in the text why the district court's November 6, 1984, order is not appealable are equally applicable to the court's first two orders.

[7] *Firestone*, 449 U.S. at 378 (citation omitted) ("interlocutory orders are not appealable 'on the mere ground that they

importance of the values underlying that claim,[8] is determinative. Nor would petitioners' claim "perish" if review were postponed until the entry of a final judgment. *Firestone*, 449 U.S. at 377. *Firestone* held that an order denying a disqualification motion is "plainly * * * reviewable on appeal after final judgment" (*ibid.*), because the "plainly adequate" remedy of ordering a new trial is available should the defendants' claim of "injury ultimately prove well founded" (*id.* at 378).

Petitioners have not asserted any interest other than the alleged prejudice to their position in the ongoing civil case. Both the district court and the court of appeals found that there has been no disclosure of grand jury materials to a person who was not already privy to the materials (Pet. App. 13a, 17a, 21a). Petitioners do not challenge these concurrent findings, and, in any event, they do not warrant further review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v.

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may be erroneous' "); see also *e.g.*, *Richardson-Merrell, Inc.* v. *Koller*, No. 84-127 (June 17, 1985), slip op. 14 ("[T]his Court has * * * expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal."); *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978).

[8] See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982) (even in cases involving constitutional claims where "vindication of the defendant's rights requires dismissal of charges altogether, the conditions justifying an interlocutory appeal are not necessarily satisfied"); *Carroll* v. *United States*, 354 U.S. 394, 406 (1957) ("[m]any interlocutory decisions * * * may be of grave importance to a litigant, yet are not amenable to appeal at the time entered"); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940) ("rejection even of a constitutional claim * * * must await * * * conviction before" appellate review is available).

United States, No. 83-1007 (Jan. 9, 1985), slip op. 7-8 n.5; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). And both Rule 6(e) itself and the district court's injunction forbid the government attorneys in this case from disclosing any grand jury materials without first obtaining a disclosure order. Thus, petitioners' only claim of injury is that that the government will gain an unfair advantage by relying on attorneys who participated in an earlier, unrelated grand jury investigation. But that concern, should it prove well grounded in fact and law, can be effectively addressed after the entry of a final judgment.[9] In sum, this case is not "qualitatively" different from *Firestone*, and the court of appeals should have dismissed petitioners' appeal.[10]

2. The court of appeals' decision on the merits of the Rule 6(e) question, however, is correct and does

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[9] Indeed, if petitioners prevail at trial, no relief will be necessary. *United States* v. *MacDonald*, 435 U.S. at 859. And if petitioners' claim requires a showing of prejudice, it cannot be addressed before trial. *Richardson-Merrell*, slip op. 13-14; *Flanagan*, 465 U.S. at 268.

[10] The court of appeals did not decide whether it could review petitioners' claim under 28 U.S.C. 1292(a)(1) or by way of mandamus (Pet. App. 7a n.6.) Review under 28 U.S.C. 1292(a)(1), however, would be improper because, as noted above, petitioners' claim may be effectively reviewed after entry of a final judgment. *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978). The incidental "relief" sought by petitioners (*e.g.*, requiring the government to seek a disclosure order or to "purge" its files of grand jury materials) also does not convert a denial of their disqualification motion into an appealable injunctive order reviewable under Section 1292(a)(1). *United States* v. *Ryan*, 402 U.S. 530, 534 (1971). Finally, this case does not present the extraordinary circumstances necessary to justify mandamus. See, *e.g.*, *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976).

not conflict with any decision of this Court or of any other court of appeals.

a. This case involves no use of grand jury materials for any purpose other than responding to petitioners' motions to dismiss and disqualify counsel. It therefore does not present the issue reserved in *Sells* "concerning continued use of grand jury materials, in the civil phase of a dispute," 463 U.S. at 431 n.15, nor does it conflict in any way with the holding in *Sells*.

b. The court of appeals ruled that the assignment of attorneys who had participated in a grand jury proceeding to a later civil case does not in itself constitute "disclosure" of grand jury materials to anyone. That ruling is plainly correct: indeed, the contrary rule would both violate the ordinary use of language and imply the potentially lifelong disqualification of government attorneys who conduct grand jury proceedings from later civil cases involving any of the same entities or the same industry.

c. The court of appeals' decision does not, as petitioners assert (Pet. 12-13), conflict with the Second Circuit's decision in *In re Grand Jury Investigation*, 774 F.2d 34 (1985), cert. granted *sub nom. United States* v. *John Doe I, Inc.*, No. 85-1613 (May 27, 1986). Unlike this case, *John Doe* involved the *use* of grand jury materials in connection with a civil suit. The Eighth Circuit in this case distinguished *John Doe* (Pet. App. 13a n.12), and the Second Circuit expressly declined to address the question decided by the Eighth Circuit in this case. 774 F.2d at 43.

d. There is no need to hold the petition in this case pending the Court's decision in *John Doe*, because the Court's decision there will not affect the judgment in this case. If the Court were to reverse

the Second Circuit's judgment in *John Doe*, the district court's decision in this case should be sustained *a fortiori*. But even if the Court were to affirm the judgment in *John Doe*, the district court's judgment in this case should stand. *John Doe* involves continuing use of grand jury materials in a civil case arising out of a grand jury investigation. This case involves no continuing use of grand jury materials, and the "distinct and separate" (Pet. App. 12a) civil case here arose from facts that occurred after the grand jury investigation was over. The two cases are similar in that neither raises the primary concerns expressed by the Court in *Sells*, the risk of wider disclosure of grand jury materials and the risk of abuse of the grand jury process to generate evidence for use in civil proceedings or to circumvent limits on civil discovery. The district court's refusal to dismiss or disqualify counsel here, however, was plainly correct without regard to the issues raised in *John Doe*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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